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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

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REPLY COMMENTS OF THE

CALIFORNIA CABLE TELEVISION ASSOCIATION

Jerry Yanowitz
Vice President, Federal Affairs
Jeffrey Sinsheimer
Director of Regulatory Affairs
California Cable Television Association
4341 Piedmont Avenue
Oakland, California 94611
(510) 428-2225

Frank W. Lloyd
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

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SUMMARY

The California Cable Television Association ("CCTA") in general supports the comments filed by the National Cable Television Association and its member companies in this proceeding.

CCTA has a particular interest, however, in assuring that all financial obligations imposed upon a cable operator by state and local governmental entities be pass-throughs outside the benchmark rate because of the extremely high level of taxation of cable television operators in California. The possessory interest tax levied in California on the use of public rights-of-way by cable television companies ranges from as little as 4 cents per subscriber per month to over $4 per month. Utility user taxes in California range from a low of 3 percent to a high of 10 percent. In some California markets, the combination of PEG access costs, franchise fees, and local taxes create a tax burden upon cable operators and subscribers of up to 25 percent of gross revenues each month. Video competitors to cable operators do not pay these taxes.

If such taxes are included in national or regional benchmarks, the overall benchmark would be higher for all cable systems. Customers in cities with lower taxes on cable would not gain the benefits, while customers and cities with higher cable taxes would not pay their full share. Moreover, if these taxes are permitted to be included outside the benchmark, and itemized

as provided for in the 1992 Act, customers would be able to judge the relative value of governmental actions in the same way they judge the price of the cable service itself. It would be far more difficult to achieve Congress' goal of reasonable cable rates if the tax burden on cable imposed by local governments remains hidden and unrestrained.

CCTA believes that a per channel formulation is not necessarily the optimal method of adding these costs to the benchmark rate. In many cases, the assessments are more logically placed on the basic tier, or allocated in a different manner.

Itemization on subscriber bills of these taxes and assessments under Section 622(c)(3) will make local goverment accountable for the exercise of its taxing authority over cable television. If a franchising authority could determine which fees fit within the allowable itemization these local governments could, and would, force cable operators to bury these costs in order to escape constituent wrath.

The FCC may be able to draft a very simple set of benchmarks that would prove to be workable and fairly assessed the reasonableness of cable rates. If, however, the FCC finds that it needs to move to a more complex set of benchmark factors, regional costs should be an essential part of the equation. CCTA has demonstrated that the consumer price index for California, particularly for its major metropolitan areas, has risen at a much faster rate than the U.S. average. Under these circumstances, the FCC should allow a cable operator to use either the local, regional or national CPI as its annual benchmark rate escalator, and should explore allowing cable operators the option of creating a local service price index.

CCTA opposes the Municipal Interests' attempt to require effective competition to be shown by each individual multichannel video competitor to cable, rather than the aggregate of such competitors. CCTA also opposes the municipal attempts to engraft on this statute a required comparison of the number and types of programming channels provided by a cable operator and its competitors. A multichannel competitor may offer substantially fewer channels than a cable operator and still be competitive, particularly if the competitor were able to obtain the most popular satellite services and could price the product significantly lower. DBS, MMDS, LMDS, SMATV and video dialtone providers have significantly lower capital start up and regulatory costs than franchised cable television operators.

The FCC should also clearly state that video dialtone in its many and varied potential forms is a multichannel video programmer. If multiple channels of programming are available, even through one channel, using a video "server" menu or gateway, it should still satisfy the statutory test.

The FCC must require disclosure by multichannel video competitors of customer information that can be used to derive penetration levels. Disclosure of the number of subscribers in each cable operator's franchise area will lessen the obvious inclination on the part of cable's competitors to understate these figures. This information is readily available and current regulatory and reporting burdens on cable's competitors is not heavy.

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REPLY COMMENTS OF THE

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Introduction

The California Cable Television Association ("CCTA") represents cable television operators who serve over 5.5 million customers. CCTA in general supports the comments filed by the National Cable Television Association ("NCTA") and its member companies in this proceeding. CCTA's Reply Comments focus on issues raised by a number of parties to this proceeding in which CCTA has a particular interest.

CCTA believes that the Commission should permit cable operators to pass through all costs mandated by local governments. Cable operators, rather than cities, should make the initial determination of what taxes and fees may be itemized on the subscriber's bill. If the FCC determines that it cannot craft a very simple set of benchmarks that will fairly assess the reasonableness of cable industry rates, then in any more complex benchmarking matrix the Commission may adopt, regional cost factors should be used, both for setting the initial benchmark rates and for computing annual benchmark increases.

In determining whether a cable operator is subject to "effective competition," the FCC should aggregate the subscriber shares of multichannel video competitors. The Commission should also require multichannel video competitors to disclose customer information to assist the FCC and franchising authorities in determining penetration levels.

1. The FCC Should Permit Cable Operators To Pass Through To Consumers Outside The Benchmark Rates All Costs Mandated By State And Local Governments.

CCTA agrees with NCTA and parties commenting on this issue that, while benchmarking is the preferable form of regulation, all financial obligations imposed upon a cable operator by a governmental entity should be considered outside the benchmark rate, and that operators should be permitted to add these costs to whatever benchmark rates the FCC sets.

Government mandated costs of cable operators have skyrocketed since the passage of the 1984 Cable Act. Taxes are one, if not the largest, source of rate variance between cable operators in different California franchise areas, as well as in different regions of the country. They are also a matter of public record and, as such, are readily identifiable.

The possessory interest tax levied in California on the use of the public right-of-way by cable television companies ranges from as little as 4 cents per subscriber per month to over $4.00 per month given the different ways California's 58 county assessors have applied the tax. Utility user taxes, as applied to cable television customers in almost 50 California franchises, range from a low of three percent to a high of ten percent. To take into account these highly divergent and easily identifiable costs, the best approach is for the FCC to remove taxes from the computation of the benchmark rates and to allow them to be added as straight pass-throughs to the regulated benchmark tier.

In some California markets, the combination of PEG access costs, franchise fees, and local taxes creates a tax burden on cable operators and subscribers of up to 25 percent of gross revenues each month. Unlike their video competitors, such as over-the-air broadcasters and SMATV, MMDS, LMDS, or DBS operators, only cable television operators and their subscribers pay these taxes. It would be unreasonable for the FCC not to permit cable operators to pass-through such taxes.

If the Commission does not adopt this approach, gross inequities contrary to sound public policy could result. For example, an operator could find itself within the benchmark at a rate the franchising authority and FCC have determined to be reasonable. Then, a county assessor could hit the cable operator with a possessory interest tax that puts the operator outside the benchmark. This could result in an operator not being able to earn a reasonable rate of return.

In addition, systems in adjacent cities with similar demographic profiles (e.g., size, density, subscribers, etc.) could well have the same rate set by the FCC's benchmarking process. But, if one city has far more onerous costs imposed by government on its cable television operator or cable subscribers, that operator should not be limited to charge the same benchmark cable rate without passing along such costs. This situation arises in places like Los Angeles County where the City of Compton places no utility user tax on cable television, but Culver City imposes an 11% tax on cable bills. The same situation holds when one county may levy a very onerous tax on the possessory interest and the neighboring county's possessory interest tax is more reasonable. The FCC should exclude these costs when determining the benchmark rate and then allow the operator to add these costs to its bill if it chooses.

This proposal will serve to keep cable rates <u>lower</u> than would otherwise be the case. First, if taxes are included in the national or regional benchmarking process, the overall benchmark will be higher for all cable systems. Thus, customers in cities with lower taxes on cable will not gain the benefits, while customers in cities with higher cable taxes will not pay their full share. Second, if these taxes are permitted to be included outside the benchmark and itemized, customers will be able to judge the relative value of governmental actions in the same way they judge the price of the cable service itself. It will be far more difficult to achieve the Congress' goal of reasonable cable rates if the tax burden on cable imposed by local government remains hidden and unrestrained.

CCTA believes that a per-channel formulation is not necessarily the optimal method of adding these costs to the benchmark rate. For example, the most aggressive California county assessors value a cable system in terms of dollars per subscriber. Thus, in some cases the possessory interest tax could be equal for all subscribers, regardless of whether they pay $16 per month for cable service or $36 per month. Therefore, the possessory interest tax is a cost required for provision of basic service and an operator should have the option of not pro-rating it over all of its utilized channel capacity. In the same way, the Act's requirement that PEG access channels be on the regulated tier would seem to dictate that these costs should not be allocated over all channels but could be added to the basic tier rate. Other taxes, such as utility user taxes or franchise fees, are readily allocable since they are computed as a percentage of gross revenue on each level of service.

CCTA agrees with the comments of Nashoba Communications Limited Partners that the Commission's proposals in this area are overly complex, and that the FCC should rely on the good faith allocations of cable operators, with appropriate Commission remedies should operators be found to allocate costs in bad faith.[1/]

2. The FCC Should Permit Cable Operators To Itemize All State and Local Taxes By Placing the Burden On Franchising Authorities To Prove That The Tax Is Not On The Transaction.

Unfortunately, the municipal interests want to have their cake and eat it, too. Their filing makes an impassioned argument for disclosure of costs by cable operators that are beyond the purview of the Act.[2/] Ironically, however, they do not want to be held accountable for the exercise of their own taxing powers over cable television.

CCTA believes that the FCC rules should permit a cable operator to determine which costs to itemize under the definitions in Section 622(c)(3). Below is an example of a benchmarked basic rate with the types of potential itemized taxes and assessments that might be found in a typical California cable system:

[1/] Comments of Nashoba Communications Limited Partners at 87.

[2/] Comments of the National Association of Telecommunications Officers and Advisors, National League of Cities, U.S. Conference of Mayors, and the National Association of Counties at 92-93. ["Franchising Interests"]

Benchmark rate	$10.00
Possessory interest tax	.95
5 percent franchise fee	.50
PEG access support costs	.40
6 percent utility user tax	.60

Total	$12.50

The clear intent of Section 622(c)(3) is to make local government accountable for the exercise of its taxing authority over cable television, to prevent local government from forcing the cable operator to bury these costs in order to escape constituent wrath. It makes no sense, as the Franchising Interests suggest, to allow the franchising authority to determine which fees fit under this category.

Senator Lott made clear his intentions when he introduced the amendment that added this section of the Act. He called for an "openness in billing" that would identify "hidden, unidentified" fees or taxes.[3/] In a system of checks and balances where government gets the choice of levying the tax, the

[3/] January 29, 1992, 138 Cong. Rec. S569 (daily ed. Jan. 29, 1992) (Statement of Senator Lott).

operator should have the ability to make these charges clear to its customers, who are the local government's constituents.[4/]

3. **If The FCC Determines To Adopt a Complex Set of Benchmark Factors, Regional Cost Differences Should be Used In Setting Benchmark Rates And In Computing Allowable Annual Rate Increases.**

CCTA agrees with Alaska cable operators that cable's costs can vary dramatically from region to region.[5/] In California, for example, labor, real estate, and insurance costs to businesses are significantly greater than in most other states. A comparison of the national Consumer Price Index ("CPI") against the local California CPI shows that the cost of living is much greater in California. The CPI for the major metropolitan areas of California, including San Diego, Los Angeles, and San

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[4/] The comments of the California League of Cities (at 23-24) and the New York State Cable Commission (at 28-29) both ask the FCC to bar certain practices of cable operators in showing the franchise fee as a separate billing item in computing the total bill sent to a subscriber. Their comments ignore the statutory language, which provides that a cable operator is permitted to identify the "amount of the total bill assessed as a franchise fee. . . ." (Section 622(c)(2)). This clearly states that the operator can break out this fee, which is a separate charge imposed by the franchising authority upon the gross revenue of the cable operator, as a separate portion of the overall subsection bill. The California League and the New York Commission seem to be objecting that some cable operators are already doing what this law clarifies that they are entitled to do. If these parties are asking the Commission to sanction the growing city practice of charging a franchise fee on the franchise fee and other governmental costs, the Commission should clearly reject this.

[5/] See e.g., Comments of Alaska Cablevision, Inc. at 3.

Francisco, has risen at a much faster rate than the U.S. average.[6]

The FCC may be able to draft a very simple set of workable benchmark tests that will prove to be workable and fairly assess the reasonableness of cable rates. However, if the FCC finds that it needs to move to a complex multifaceted benchmark approach, regional costs should be an essential part of the equation. It would be inequitable to tie California or other high cost areas to a national average either for initial benchmark rates or for increases in such rates when the costs to cable operators for the delivery of cable television service are already higher than the national average, and are increasing at a greater rate than in other regions. The Commission should allow a cable operator to use either the local, regional, or national CPI as its annual benchmark rate escalator.

CCTA also suggests the Commission further explore the option of allowing cable operators at their option to create a Local Service Price Index ("LSPI") if the operator believes it to be more accurate and is willing to incur the costs of preparing the index. Although the great majority of cable operators will not

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[6] CCTA has provided detailed data to the Commission showing the differences between California data and the U.S. averages in its filing in the FCC's 1991 "Effective Competition" Docket. See CCTA Comments, In re Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket No. 90-4, Feb. 14, 1991 at 19 and Attachments 2-4.

find this necessary, creation of an LSPI could provide viable option for those operators who are incurring significant local costs and find themselves outside the benchmark. As noted in the comments of Policy Communications, Inc. in support of this approach, the federal government is moving in this direction in setting pay scales.[7/] The FCC could set guidelines and allow the cable operator to submit new benchmark data based on an LSPI and give franchising authorities the option of filing a rebuttal.

4. The FCC Rules Should Interpret "Effective Competition" To Cable To Include Aggregated Multichannel Video Competitors.

CCTA strongly disagrees with the Franchising Interests that the test of whether there is "effective competition" to a cable operator should be based on a comparison of the number and types of programming channels provided by a cable operator and its competitor. This vague proposal has no basis in either the Act or its legislative history.

The statutory test for "effective competition" is straightforward. A multichannel video competitor to cable is any entity that makes multiple channels of video programming available for purchase.[8/] The suggestion by the Franchising Interests that multichannel video competitors should be considered competitive by the FCC only if there is a less than 20 percent difference in

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7/ Policy Communications, Inc. Comments at 5.

8/ Section 602(12).

the number of channels of programming offered is simply not found within or supported by the Act. They even admit that this 20 percent figure is a "guesstimate."[9] Such a rule could serve to stifle deployment of technology because it creates a potential cap on cable channel expansion.

For example, suppose that a cable operator currently has 54 channels and competes with an LMDS or DBS system that offers 49 channels. If there is a 20 percent ceiling in the channel capacity spread beyond which rate regulation is to be initiated, the cable operator will hesitate to use signal compression to enhance capacity beyond 60 channels because deploying new services would subject the operator to rate regulation. In an era where technological innovation may create systems with more than 500 channels, a cap on channel capacity would frustrate development of new cable and telecommunications services.

A multichannel competitor can be very competitive with a cable operator even with far fewer channels. A multichannel competitor to cable may offer 34 channels -- including the 20 most popular satellite services -- and be competitive with a cable operator offering 54 channels, particularly if the competitor were able to price its product significantly lower. In recognizing MMDS, a technology with a current maximum of approximately 34 channels, without compression, as a competitor

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[9] Municipal Interests Comments at 14.

to cable systems, the Act clearly envisions the potential for viable competitors to cable television with far fewer channels than cable systems.

The Franchising Interests also neglect the question of price/value relationship in their attempt to narrow the definition of a competitive "multichannel video programming distributor." DBS, MMDS, LMDS, SMATV, and video dialtone providers have significantly lower capital, start-up or regulatory costs than franchised cable television service. Thus they can and will price their product below that of their cable competitors.

The Commission should state that video dialtone in its many potential forms is a multichannel video programmer. Certainly, if a subscriber is able to choose from a menu of 60 channels or 500 different movies or other programs through a video dialtone "server" menu or gateway, this is competitive with cable even if only one channel is actually delivered by the telephone company to the home. The fact that multiple channels of programming are available through a menu should satisfy the requirement of "making multiple channels of video programming available." The fact that it is delivered through only one or two channels is a technological distinction without a practical difference.

CCTA agrees with the FCC that the 15 percent penetration test for cable competitors should be cumulative. If Congress had intended each multichannel distributor to reach 15 percent, it would have stated so clearly. Using the latter definition could lead to the absurd result of four multichannel video competitors having a combined penetration rate greater than the franchised cable operator, while that operator would be deemed not subject to effective competition. A 15 percent cumulative definition accurately reflects the language of the Act.

Moreover, the Commission should consider that cable competitors' penetration is likely to be understated because of theft of service. MMDS, for example, has been notorious for maintaining poor signal security. It is unclear how secure DBS signals will be. Each unpaid subscriber to a competitive service reduces cable's market power as surely as a paying subscriber. It could well be that, although paid "subscribing" penetration is 15 percent, actual penetration by video competitors, both paid and unpaid, is substantially over the 15 percent threshold for effective competition to exist. This further supports the reasonableness of aggregating the penetration of multichannel video competitors to reach the 15 percent threshold.

Finally, in a position that highlights the tortuous logic found throughout their filing, the Franchising Interests suggest that DBS should not actually be considered "offered" unless some amount of local advertising is done as opposed to "advertisements in the national media."[10/] There is no basis for this position in either the Act or in its legislative history. In fact, this could lead to the ridiculous situation where a national DBS distributor advertises on the Super Bowl or World Series with a direct market "800 number" response campaign, and yet, by the Franchising Interests' definition, the DBS provider would not be offering the product anywhere in the country.

Every multichannel video provider in a market will use the means it considers most effective to reach potential subscribers. If the Franchising Interests are correct and there is such gross dissatisfaction with cable, current and former customers will be searching out alternative providers. The Act's ultimate test is penetration. How it is achieved is irrelevant.

5. The FCC Must Require Disclosure By MultiChannel Video Competitors Of Customer Information That Can Be Used To Derive Penetration Levels.

The Wireless Cable Association, Inc. ("WCA") acknowledges in its Comments the need for the Commission to collect information necessary to determine when more than 15 percent of homes subscribe to services offered by other multi-channel video program distributors and the obligation of such services to

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10/ Id. at 15.

provide the information.[11/] CCTA understands WCA's concerns about subscriber privacy, but the hurdles WCA erects make it very difficult for a showing of "effective competition" to be made on a timely basis.

CCTA suggests that other multichannel video providers be required to publicly disclose the number of subscribers in each cable operator's franchise area in the same manner as those franchised cable operators. Public scrutiny of these numbers will tend to lessen the obvious inclination on the part of cable's competitors to understate these figures. Both the franchising authority and competitive providers clearly have an incentive to keep the franchise operator hobbled by regulation by holding competitors' penetration rates below 15 percent. Public scrutiny of subscriber numbers will be a restraint against behavior designed to evade a conclusion that effective competition exists in a particular market.

Given the dynamic nature of the competitive marketplace, CCTA suggests that the Commission require this information to be provided at least quarterly upon the request of a cable operator who has reason to believe that the requisite level of competitive penetration has been reached. This information will be readily available to any competitive video provider, thus it should not be a burden to provide it on this basis.

[11/] WCA comments at 9.

CCTA also believes the alternative service provider should pay for the costs for providing this information. Cable operators have significant burdens of providing information to their franchising authority and the FCC on a continuing basis. It is reasonable that alternative video providers bear the burden of providing this information to both the Commission and the local franchising authority. Their reporting and regulatory burden is not a heavy one.

CCTA also suggests that the FCC consider requiring alternative video providers to provide information by nine digit zip code as well as by franchise area. There are numerous areas of the country where the information will need to be on a more discrete basis than solely by city. Los Angeles, for example, has many different cable operators serving one city. These vast urban markets are also areas that have been most heavily targeted by competitors. If a fair assessment of competitive behavior is to be made, subscriber figures for units more discrete than cities will have to be available in such instances.

Respectfully submitted,

Jerry Yanowitz /sm

Jerry Yanowitz
Vice President, Federal Affairs
Jeffrey Sinsheimer
Director of Regulatory Affairs
California Cable Television Association
4341 Piedmont Avenue
Oakland, California 94611
(510) 428-2225

Frank W. Lloyd
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Suite 900
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